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No. 02-6320

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

John J. Fellers,

Petitioner,

v.

United States of America.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

ALFRED P. CARLTON
Counsel of Record
President
Thomas C. Goldstein
Rory K. Little
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

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INTEREST OF THE *AMICUS*[1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair system of justice. The ABA's more than 400,000 members include prosecutors, public defenders, private attorneys, state and federal trial and appellate judges, legislators, law professors, law enforcement and corrections personnel, law students, and nonlawyer "associates" in allied fields. Since its inception, the ABA has actively promoted improving the administration of justice and increasing the availability and quality of legal counseling to those who need it.

The ABA respectfully submits this brief *amicus curiae* because both of the questions presented by this case implicate matters addressed by the Standards for Criminal Justice promulgated by the ABA. The Standards are widely referenced, including by this Court, as a guide to criminal justice administration. They have been developed, refined, and approved over more than thirty years by task forces of the ABA made up of prosecutors, judges, defense lawyers, academics, and others, as well as by the wider and diverse membership of the ABA. As Chief Justice Warren Burger wrote in the Introduction to the First Edition, in his view the Standards project should be regarded as "the single most comprehensive and probably the most monumental

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[1] No counsel for any party authored any part of this brief. No persons other than *amicus curiae* and its counsel made a monetary contribution to the preparation and submission of this brief. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

undertaking in the field of criminal justice ever attempted by the American legal profession *in our national history*." Warren Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974) (emphasis added).

As discussed further in Part I, *infra*, the Standards do not purport to set forth the ABA's views on the requirements of the Constitution, including the Sixth Amendment right to counsel. However, they do represent a considered collection of "best practices" for the criminal justice system, aspirational targets that an experienced group of prosecutors, defenders and judges have agreed upon. As such, the Standards have often been referred to by this Court to inform its constitutional analysis. As relevant to this case, the Standards not only aspire towards the greater involvement of defense counsel at the earliest stages of the defendant's detention, they also recognize and address the special role of counsel once the defendant is formally charged. Indeed, even prior to the promulgation of the Standards for Criminal Justice, "previously adopted ABA standards have all emphasized the importance of early appointment [of counsel]." ABA Standards for Criminal Justice 5.1 cmt (1st ed. 1971).

The ABA accordingly respectfully submits that this Court would benefit from this brief *amicus curiae*, which seeks to address the questions presented from the perspective of the Criminal Justice Standards.

ARGUMENT

I. The ABA Criminal Justice Standards Provide Agreed-Upon Views of Experienced Criminal Practitioners, And This Court Has Recognized That They May Inform Constitutional Analysis.

1. The Function and Limits of the ABA Criminal Justice Standards. As set forth in both Defense Function Standard 4-1.1 and Prosecution Function Standard 3-1.1, the Standards for Criminal Justice of the American Bar Association "are

intended to be used as a guide to professional conduct and performance." Standard 4-1.1. The Standards thus do not purport to define the requirements of the Constitution or statutory law. They do, however, present a consensus view of a wide array of criminal practitioners, reached after careful study, of appropriate means of administering the criminal justice system in the fairest manner practicable. As set forth in the Introduction to the Prosecution Function and Defense Function Standards, the Standards are

> the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal Justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

The current iteration of the Standards, the Third Edition (1992), was itself the result of five years of preparation by ABA task forces. The Standards were subject to review and revision at each level of the ABA Criminal Justice Section. They were then further revised in light of comments solicited from a wide variety of expert outside sources, including the U.S. Department of Justice, the ABA Judicial Administration Division, the National Association of Attorneys General, the National Association of Criminal Defense Lawyers, the National District Attorneys Association, and the National Legal Aid and Defender Association. They were then approved by the ABA's general governing body, the House of Delegates.

Thus, the Standards reflect a consensus view of "better practice" (*Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000)) and provide an important guide that may, "depending on all the circumstances" (Standard 4-1.1), inform the constitutional

analysis, including in the Sixth Amendment context. For example, the Court's seminal ruling in *Strickland* v. *Washington*, 466 U.S. 668, 688-89 (1984), recognizes that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like, are guides to determining what [performance of counsel] is reasonable." See also *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000) (applying *Strickland* and citing the Standards). The Court in *Argersinger* v. *Hamlin*, 407 U.S. 25, 39 (1972), similarly relied on the Standards in holding that the Sixth Amendment requires the government to provide defense counsel if an offense may lead to incarceration. Concurring, Chief Justice Burger recognized that the ABA in promulgating the Standards "was not addressing itself, as we must in this case, to the constitutional requirement but only to the broad policy issue." *Id.* at 43.[2] Yet, he explained, the Standards were relevant to the constitutional inquiry because "[t]he right to counsel has historically been an evolving concept," and "[p]art of this evolution has been expressed in the policy preferences of the legal profession itself, and the contributions of the organized bar and individual lawyers – such as those appointed to represent the indigent defendants in the *Powell* and *Gideon* cases – have been notable." *Id.* at 44.

This Court's precedents suggest that consideration of the ABA Standards is particularly appropriate in the Sixth Amendment context. This Court takes a "pragmatic approach" in defining the "scope of the Sixth Amendment right to counsel." *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988); see also *id.* at 298 ("[W]e have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at a particular

[2] Accord *Jones* v. *Barnes*, 463 U.S. 745, 753 n.6 (1983) ("the fact that the ABA may have chosen to recognize a given practice as desirable does not mean that practice is required by the Constitution").

proceeding, and the dangers to the accused of proceeding without counsel."); see also *Scott* v. *Illinois*, 440 U.S. 367, 373 (1979) (affirming *Argersinger* because it had "proved reasonably workable").[3] The ABA Standards, which Chief Justice Burger described as "the richest reservoir of experience ever developed concerning the functioning of our criminal justice system," reflect a consensus among the legal community on the practicalities of criminal procedure regarding advice and provision of counsel.

Thus, this Court applied the ABA Standards in the Sixth Amendment case of *Nix* v. *Whiteside*, 475 U.S. 157 (1986). The *Nix* Court relied on the "evolution of the contemporary standards promulgated by the American Bar Association" to conclude that the Sixth Amendment was not violated by counsel's refusal to assist the defendant in presenting perjured testimony at trial. *Id.* at 170 n.6. See also *Caldwell* v. *Mississippi*, 472 U.S. 320, 334 n.6 (1985) (citing the ABA Standards in holding unconstitutional statements made in prosecutor's closing argument); cf. *Moran* v. *Burbine*, 475 U.S. 412, 440 (1986) (Stevens, J., dissenting) (noting that "this Court frequently finds helpful" the ABA Standards for Criminal Justice; citing *Nix* and *Caldwell*, *supra*).[4]

For these reasons, federal and state courts at all levels regularly cite the ABA's Criminal Justice Standards as persuasive authority with respect to an array of questions relating to the proper functioning of the criminal justice

[3] See also *McNeil* v. *Wisconsin*, 501 U.S. 171, 183 (1991) (Kennedy, J., concurring); *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986); *Strickland* v. *Washington*, 466 U.S. 668, 696 (1984); *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).

[4] For more examples of consideration by this Court of the ABA Standards, see, e.g., *Michigan* v. *Harvie*, 494 U.S. 344, 364 n.8 (1990); *McCoy* v. *Court of Appeals*, 486 U.S. 429, 436 n.8 (1988); *Ake* v. *Oklahoma*, 470 U.S. 68, 81 n.7 (1985); *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 n.10 (1984); *Bearden* v. *Georgia*, 461 U.S. 660, 669 n.10 (1983).

system. In addition to the decisions of this Court cited *supra*, see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 322 n.48 (2001); *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989). For recent decisions in the federal courts of appeals, see, *e.g.*, *United States* v. *Leonti*, 2003 U.S. App. LEXIS 7727, at *22 (CA9 2003) (professional responsibility); *Mitchell* v. *Mason*, 2003 U.S. App. LEXIS 6511, at *41 n.6 (CA6 2003) (same); *Roccisano* v. *Menifee*, 293 F.3d 51, 60 (CA2 2002) (effective assistance of counsel).

2. The Standards Recognize, As Does This Court, The "Essential" Character of the Right to Counsel. The ABA Defense Function Standards highlight the importance of the right to counsel to the administration of the criminal justice system and, in that basic and important respect, are consistent with this Court's Sixth Amendment precedents and with the historical development over two-hundred-plus years of the Sixth Amendment right to counsel. The right to counsel conferred upon defendants is, in the words of Standard 4-1.2, "an essential component of the administration of criminal justice." As the Standards recognize, "[a] court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused." As set forth in the introduction to the first draft of the Providing Defense Standards, "[t]he fundamental premise of these standards is that representation by counsel is desirable in criminal cases *both* from the viewpoint of the defendant and of society."

"[S]ociety has deliberately chosen the adversary system—a vigorous clash of opposing sides—as the mechanism for trying criminal cases." *Id.* Counsel for the state and the defendant are charged with vigorously pursuing the legal and factual claims relating to alleged violations of the criminal law. An imbalance in this contesting representation has the potential to undermine the judiciary's ability to make an accurate determination of guilt or innocence. Each component, including defense counsel, is

properly regarded as "essential to the fulfillment of the court's responsibility in the administration of criminal justice," for "[t]he adversary system requires defense counsel's presence and zealous professional advocacy just as it requires the presence and zealous advocacy of the prosecutor and the constant neutrality of the judge." ABA Standards for Criminal Justice 4-1.2 cmt (3d ed. 1992).

Consistent with the Standards, this Court has long considered it "an obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). An accused "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). Indeed, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985). This Court has accordingly decreed: "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (internal quotation marks omitted).

The importance of a fully realized right to counsel is thus viewed by commentators as "the most prized, most fundamental constitutional entitlement of every person charged with a criminal offense." James J. Tomkoviez, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 2 (2002). "No constitutional right of the accused has been so consistently recognized as 'fundamental' to a fair adjudication of guilt as the Sixth Amendment right to counsel." 2 Joseph G. Cook,

CONSTITUTIONAL RIGHTS OF THE ACCUSED § 8:1 (3d ed. 1996). This "monumental right" has been "highly praised" and is "the master key to all the rules and procedures designed to ensure the reliability of the guilt-determining process." Yale Kamisar, *Foreword* to Tomkoviez, *supra*, at xvii. It is "the linchpin of constitutional protection" (Ronald J. Allen et al., COMPREHENSIVE CRIMINAL PROCEDURE 103 (2001)) and an accused person's "most pervasive right" (Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

3. The ABA Has Recognized that Historical Sources Are Also in Agreement. The value ascribed to the right to counsel by the Standards, this Court's precedents, and commentators relates in no small part to the importance of the right through history. The right to counsel recognized by the states itself traces at least to seventeenth-century England, where common law courts extended it only to those accused of misdemeanors and trespasses – *not* to those accused of the most serious crimes. *E.g.*, 1 James Fitzjames Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 397 (1883). As early as 1695, England began to reverse this policy by extending the right to counsel to those accused of serious offenses. The Treason Act of that year authorized "every person * * * accused and indicted, arraigned or tried for any" treason "to make his and their full defence, by counsel learned in the law." 7 Wm. III, c. 3. The moment of indictment has thus always played a significant role in defining the right. Over the course of the eighteenth century — as the state strengthened and stabilized, and as professional prosecutors replaced lay victims — British courts gradually extended the right beyond cases of treason to all criminal trials. Francis H. Heller, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 10 (1951); J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIS. REV. 221, 224 (1991). The new rule, recognizing a

universal right to counsel, was finally codified by statute in 1836. 6 & 7 W.4, c. 114, s. 1, 2.

The American colonies recognized the right to counsel through the seventeenth and eighteenth centuries.[5] The

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[5] In 1641, the Massachusetts colony enacted a statute granting the right to unpaid counsel: "Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines." The Body of Liberties: The Liberties of the Massachusetts Collonie in New England, 1641, at 99 (1843), quoted in THE FOUNDERS' CONSTITUTION 246 (Philip B. Kurland & Ralph Lerner, eds., 1987). By 1660, the colony of Rhode Island had gone even further by recognizing "the lawful privilege of any person that is indicted, to procure an attorney to plead any point of law that may make for the clearing of his innocencye." 2 John R. Bartlett, COLONIAL RECORDS OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 239 (1857), quoted in Tomkoviez, *supra*, at 11. Rhode Island explained that it granted this universal right because "it doth appeare that any person inhabiting in this jurisdiction, may on good grounds, or through malice and envie be indicted and accused for matters criminall, wherein the person that is soe [accused] may be innocent, and yet may not bee accomplished with soe much wisome and knowledge of the law as to plead his own innocencye." *Id.*

Other colonies followed the lead of Rhode Island. Delaware included in its Charter that "all criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." Delaware Charter of 1701, art. V, quoted in THE FOUNDERS CONSTITUTION, *supra*, at 247. Vermont similarly decreed: "[I]n all prosecutions for criminal offenses, a man hath a right to be heard, by himself and his counsel." Vermont Const. of 1777, ch. 1, art. 10, quoted in THE FOUNDERS' CONSTITUTION, *supra*, at 259. Indeed, prior to adoption of the Sixth Amendment, "in at least twelve of the thirteen colonies the rule of the English common law * * * had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions." *Powell* v. *Alabama*, 287 U.S. at 64-65.

absence of the right to counsel in the articles of the original U.S. Constitution was cited as a reason for conditioning ratification upon the addition of a Bill of Rights: "[W]hether the criminal is to be allowed the benefit of counsel, whether he is to be allowed to meet his accuser face to face; * * * we are not yet told. These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges." MASSACHUSETTS RATIFYING CONVENTION, Comments of Mr. Holmes, quoted in THE FOUNDERS' CONSTITUTION, *supra*, at 260. It is therefore unsurprising that when the Bill of Rights was added, it included the guarantee: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. This Court has taken note of the distinctive American focus on the right to counsel: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, *but it is in ours*." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) (emphasis added).

The ABA has consistently noted this history in formulating its Standards. Thus, as described by the First Edition of the Providing Defense Services Standards (published in 1968), "Our courts have undertaken to protect persons accused of crime and lacking legal representation since the earliest periods of our history." The First Edition noted the recognition of the right to counsel by many states in the nineteenth century, and sought to identify "the most promising avenues for the effectuation of the right to be provided counsel which can be derived from the quite considerable experience of the several states in coping with this problem."

II. The Court of Appeals' Decision Is Not Consistent With The Principle of Defendants Receiving Notice of Their Right To Counsel, And Receiving Counsel, At the Earliest Possible Time, As Expressed In The ABA Criminal Justice Standards and Accompanying Commentary.

A. The Facts and Issues Presented

The first question presented by this case addresses the initial, post-indictment contact between petitioner and the police. Subsequent to petitioner's indictment, police went to his home, where they explained that they wanted to talk to him about his involvement with methamphetamine and his association with certain persons. The district court determined, the court of appeals accepted, and the United States has not challenged in this Court, that petitioner was at that point in police "custody." The police did not advise petitioner of his right to counsel, and no counsel was present during the interview. Petitioner made incriminating statements with respect to the charges.

The Eighth Circuit held that the police had no obligation to advise petitioner of his right to counsel because they did not "interrogate" him. The first question presented accordingly relates to whether the police, upon contacting an indicted criminal defendant to conduct an interview about the charged offenses, should advise the defendant of this right to counsel.

The second question presented addresses the post-indictment interview of petitioner by the police after the police transported petitioner to jail. Prior to this interview, the police advised petitioner of the list of rights available under *Miranda* v. *Arizona*, including a right to counsel. After agreeing to speak with the officers, petitioner reiterated the statements he had previously made at his home and

furthermore admitted his association with additional individuals involved with methamphetamine.

The court of appeals held that petitioner's waiver of his Fifth Amendment *Miranda* rights prior to making incriminating statements *per se* cured any prior violation of petitioner's Sixth Amendment rights, without regard to whether petitioner's statements would otherwise be regarded under the facts and circumstances of the case as the excluded "fruits" of his earlier, unlawfully elicited statements. At a broad level of generality, the second question presented concerns the relationship between *Miranda* warnings and the right to counsel. More specifically – and assuming with respect to the first question presented that officers violated petitioner's Sixth Amendment right to counsel in their initial, post-indictment interview – the second question addresses whether and when such a violation "taints" subsequent statements or alternatively is "cured" by a *Miranda* warning.

B. Question One: The ABA Standards Support the View That, in Their Initial Contact with Petitioner, Police Should Not Have Deliberately Elicited Information from Him Without Advising Him of His Right to Counsel, Given That Petitioner Had Been Indicted.

Both the Standards and this Court's precedents regard the availability of defense counsel as "an essential component of the administration of criminal justice." ABA Standards for Criminal Justice 4-1.2 (3d ed. 1992). The central role of defense counsel in the courts' assessment of guilt and innocence guides the determination of at what point in time the state should advise the defendant of the right to counsel and should provide the defendant with the opportunity to consult with counsel. If a defendant who is arrested or is otherwise the subject of formal charges is delayed or denied access to counsel, the prospect arises that the defendant will act without awareness of his or her rights. ABA Standards for Criminal Justice 5-6.1 accordingly states that counsel should "be provided to the accused as soon as feasible and, in any

event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest." The commentary to the Standard confirms that "[e]ffective representation of the accused requires that counsel be provided at the earliest possible time." The commentary to the comparable standard in the First Edition similarly reflects the "strong consensus among judges, prosecutors and defense counsel that appointment of counsel at the earliest possible stage is a critical aspect of providing representation that is truly valuable and effective."

Indeed, the ABA modified Standard 5-6.1 in 1992 to read "[t]he authorities should *promptly* notify the * * * official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel," adding the word "promptly" in order "to denote the urgency with which action should be taken" in providing counsel. ABA Standards for Criminal Justice 5-6.1 cmt, at 77 (3d ed. 1992) (emphasis added).

Standard 5-8.1 furthermore provides that a person taken into custody "should immediately be informed, preferably by defense counsel, of the right to legal representation." Standard 5-8.1 goes somewhat further than Standard 5-6.1, in that Standard 5-8.1 expressly states that advice about legal representation rights should "preferably" be given "by defense counsel," not law enforcement officials. Standard 5-8.1 "deals with important aspects of achieving early representation by counsel, that is, the party responsible for notifying the accused concerning the right to representation by counsel, where and when such notice should be given, and in what manner it should be provided." ABA Standards for Criminal Justice 5-8.1 cmt (3d ed. 1992). Thus both Standard 5-6.1 and Standard 5-8.1 presume that counsel will be "provided" to defendants who have been formally charged.

These Standards reflect the consensus view of the ABA – and of the experts in the criminal justice field, both prosecution and defense, who had a role in crafting the

Standards – that effective representation of criminal defendants, which is necessary to give meaningful effect to the right to counsel, requires that at a minimum, suspects should be informed of their right to counsel when they are formally charged or taken into custody, before they are questioned. Accord ABA Standards for Criminal Justice, The Defense Function 145 (1st ed. 1971).

Other national criminal justice organizations express similar views in the formal standards they have promulgated. The National Advisory Commission on Criminal Justice Standards and Goals urges that representation be made available "beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect." National Advisory Commission On Criminal Justice Standard 13.1.[6] The Commission notes that the right to counsel is not confined to trial, and that publicly provided lawyers "are involved in the investigatory stages of a criminal case * * *." *Id.*, Intro. to Chapter 13. Further, the National Legal Aid and Defender Association's ("NLADA") Guidelines for Legal Defense Systems in the United States advocate that representation should be available when a person is arrested, detained, or "reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature * * *." 1 National

[6] In 1971, the Law Enforcement Assistance Administration ("LEAA") appointed the National Advisory Commission on Criminal Justice Standards and Goals to formulate national criminal justice standards and goals for crime reduction. In 1973, the commission issued six extensive reports, developed by separate task forces, each with dozens of staff members. The Report of the Task Force on the Courts set standards for each of the criminal justice system's component parts, including courts, court administration, prosecution and defense. 13 Report of National Advisory Commission on Criminal Justice intro. (1973).

Legal Aid and Defender Association Guidelines for Legal Defense Systems 1.1(a), 1.2.[7]

ABA Standard 4-3.6, entitled "Prompt Action to Protect the Accused," sets forth the rationale for making counsel available to the defendant at the outset. "Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights." As the commentary explains, "Many of the rights that the law guarantees to an accused person can be vindicated only by prompt action. One of the lawyer's most significant tasks is to inform the client of the nature, extent, and importance of constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning the privilege against self-incrimination and the appropriate responses to be made to a lineup, interrogation, or problems relating to statements to news media." ABA Standards for Criminal Justice 4-3.6 cmt (3d ed. 1992). The commentary concludes that "unless the indigent accused is provided counsel at the earliest possible time, discrimination occurs between the poor defendant and the defendant of financial means." *Id.*

The police in this case did not adhere to the principles of immediately notifying a defendant of his right to counsel and

[7] Like the ABA Standards, the NLADA Guidelines were adopted after extensive study and consultation, including the preparation of a draft report and a three-day National Colloquium on the Future of Defender Services, to which were invited all state chief justices, state bar presidents, LEAA state planning agency executive directors, and defender program heads from around the country. "The Colloquium produced some 60 commentaries upon the Draft Report, which was then further reviewed by the Commission and Colloquium participants." National Legal Aid and Defender Association Guidelines for Legal Defense Systems intro.

immediately providing the defendant access to counsel. Petitioner had already been formally indicted when he was placed in custody and interviewed by the police. Yet even though he had already been indicted, petitioner was not informed of his right to counsel until after officers deliberately elicited incriminating statements from him and transported him to jail. Under Standard 5-8.1, petitioner should have been advised of his right to, and provided with, counsel immediately upon his first encounter with police, or at least prior to any questioning.

Standard 5-6.1 "extends beyond [this] Court's decisions" (ABA Standards for Criminal Justice 5-6.1 cmt (3d ed. 1992)) with respect to both pre-formal charge questioning and the role of defense counsel once the Sixth Amendment right to counsel attaches. Nevertheless, the core of the Standard as applied to a formally accused suspect is consistent with this Court's precedents and is inconsistent with the approach taken by the court of appeals in this case. It is settled that "an indicted defendant has the 'right to rely on counsel as a "medium" between him and the State' whenever the State attempts to deliberately elicit information from him." *Michigan* v. *Harvey*, 494 U.S. 344, 359 (1990) (citations omitted). There is no dispute either that the initial interview in this case occurred after petitioner was indicted or that the police attempted to "deliberately elicit" information in the course of that interview. Accordingly, under both the Standards and this Court's precedents, petitioner should at least have been advised of his right to counsel before the initial, post-indictment interview.

C. Question Two: The ABA Standards Support Promptly and Fully Advising A Defendant of His Rights Regarding Counsel, and Suggest That Constitutional Violations of Those Rights May Require Greater Remedies Than Do Mere Violations of *Miranda*

With respect to the second question presented, it appears that the police in this case did not conform to the principles

set forth in the ABA Standards and Commentary in their subsequent interview with petitioner at the jail. Rather than providing counsel to the petitioner, and then allowing defense counsel to explain his rights to legal representation, the officers simply advised him of the brief list of rights available under *Miranda* v. *Arizona* in furtherance of the Fifth Amendment right not to be compelled to incriminate oneself. Petitioner then signed a waiver of those rights.

Although police provided the warnings in this case, Standard 5-8.1 provides that a person taken into custody "should immediately be informed, *preferably by defense counsel*, of the right to legal representation" (emphasis added).

The Commentary to Standard 5-8.1 furthermore recognizes a distinction between the Fifth Amendment *Miranda* rights and the distinct Sixth Amendment right to legal representation that attaches when criminal charges are instituted. ABA Standards for Criminal Justice 5-8.1 cmt (3d ed. 1992). The Commentary explains that advising a defendant of the right to counsel "should not be confused with the 'warning' required pursuant to *Miranda* v. *Arizona*." *Id.* "[T]he fact that a warning valid within the meaning of *Miranda* has been made should not in itself be considered as fulfilling the requirements of a formal offer [of counsel]." *Id.* Because "[t]he manner in which counsel is offered to the accused has considerable impact on the decision whether to accept or reject the assistance of counsel," "the circumstances and terms of [a *Miranda*] warning cannot fulfill all the requirements for an offer of counsel." *Id.* In this case, where the police merely "*Mirandized*" petitioner, the Standards have relevance both to the questions of waiver and of remedy.

Although Standard 5-8.1 and its accompanying Commentary – which trace to the promulgation of the First Edition in 1967 – would require more for adequate advice than this Court required in *Patterson* v. *Illinois*, 487 U.S. 295 (1988), *Patterson* does not address the question of what

remedy is required when the police violate *Massiah* v. *United States*, 377 U.S. 201 (1964), and the Sixth Amendment rights of an accused. Indeed, this Court's decisions, like Standard 5-8.1, seem to recognize that a constitutional violation of the Sixth Amendment may require remedies beyond those required when only *Miranda* is violated. Thus, *Michigan* v. *Harvey*, 494 U.S. 344 (1990), suggests that while a violation of the rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), did not require suppression of a statement used for impeachment, a constitutional *Massiah* violation would.

Here, the Eighth Circuit held not merely that *Miranda* warnings provided by police adequately advised petitioner of his right to counsel (a result supported by *Patterson*), but also that the warnings "cured" a previous constitutional violation of the Sixth Amendment such that suppression was not required (an issue not addressed by *Patterson*). The ABA Standards and Commentary are consistent with this Court's decisions in suggesting that once the right to counsel attaches, constitutional violations of that right require greater remedies than mere violations of *Miranda*.[8]

CONCLUSION

This *amicus brief* is intended to emphasize the ABA's long-standing concern for meaningful protection of the constitutional right to counsel for all persons formally charged with a crime, and to note that greater protections may be required for Sixth Amendment violations than for simple

[8] The presence of the prior constitutional violation in this case also distinguishes it from *Oregon* v. *Elstad*, 470 U.S. 298 (1985), in which this Court was careful to distinguish what it viewed as a non-constitutional *Miranda* violation from a "constitutional violation," which "traditionally ha[s] mandated a broad application of the 'fruits' doctrine." *Id.* at 305-06. See also *id.* at 308 (distinguishing the case from "the doctrine expressed in *Wong Sun* that the fruits of a constitutional violation must be

Miranda violations, in order to make vital the constitutional Right to Counsel.

Respectfully submitted,

ALFRED P. CARLTON
Counsel of Record
President
Thomas C. Goldstein
Rory K. Little
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

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